In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1004

A. C. SUHREN, LYDIA COOK SUHREN, ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the court of appeals, Pet. App. 16-28, and, on rehearing, 29-34, are reported at 399 F.2d 485 and 414 F.2d 784, respectively.

JURISDICTION

The final judgment of the court of appeals was entered on August 7, 1969. On October 24, 1969, Mr. Justice Black entered an order extending the

time for filing a petition to January 3, 1970. The petition was filed on December 29, 1969. Jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the United States, which had provided federal financial and technical assistance in filling submerged land under Mississippi Sound and constructing a beach to protect a seawall pursuant to a contract with Harrison County, Mississippi, was entitled to specific enforcement of the county's agreement in the contract to assure perpetual public use of the beach.

2. Whether enforcement of the contract is inconsistent with the Submerged Lands Act, 43 U.S.C. 1301 *et seq.*

STATEMENT

This suit was brought by the United States to enforce its contract with Harrison County, Mississippi, wherein the County, in return for a federal contribution of $1,333,000 and technical assistance in the repair of hurricane damage to the 17-mile seawall along Mississippi Sound and construction of a sand beach as further protection, agreed "to provide at its own expense all necessary lands, easements, and rights-of-way, and agreed to assure perpetual public use of the beach and the administration thereof for public use only" (Pet. App. 24). The factual and statutory background of this contract, which was

executed in 1951, is set forth in detail in the opinion of court of appeals (Pet. App. 17-24). A series of hurricanes, culminating in a hurricane of 1947, caused such serious damage to the seawall along the Sound that the financial resources of Harrison County were insufficient to pay for the required repairs, and federal assistance was sought. At that time such assistance was available only for publicly-owned shores (Pet. App. 22). Accordingly, appropriate legislation was enacted by the State of Mississippi and by Harrison County to enable the latter to qualify for federal assistance (Pet. App. 21-24). This included a resolution of the Board of Supervisors of Harrison County in 1950 "perpetually dedicating to the public as a public beach" the area here in question, which was to be constructed with the requested federal aid (Pet. App. 24). Construction of the beach pursuant to the federal contract was completed in 1951.

Thereafter, the federal government became aware of a series of "incidents in which members of the general public were forcibly denied the use and enjoyment of the beach," in violation of the County's dedication of the beach and contrary to the 1951 contract with the United States (Pet. App. 24).[1] The United States instituted this suit in 1960 to enforce the provision of its contract requiring maintenance of the beach as a public beach. The district court (W.

[1] The record discloses that the "incidents" constituted a systematic exclusion of Negroes from the beach. Convictions of a group of 41 such Negroes for trespass were summarily reversed by this Court in 1966. *Mason et al.* v. *City of Biloxi*, 385 U.S. 370.

Harold Cox, J.) denied relief, primarily on the ground that such relief was inconsistent with the rights of adjacent landowners under local property law as announced by the Supreme Court of Mississippi in *Harrison County, Mississippi* v. *Guice*, 244 Miss. 95, 140 So. 2d 838, a suit which had been brought by a defendant in the present case while the latter was pending in the district court.

The court of appeals reversed the judgment of the district court, holding that the United States was entitled to enforce the County's agreement to preserve and maintain the filled lands as a public beach. The court held that the *Guice* decision—in which the State court had held that the adjacent landowners became the owners of the beach constructed entirely from public funds—was not controlling in the present case because the United States was not a party in the State litigation and the County in that case had denied that it had agreed to maintain a public beach (Pet. App. 26-27). The court also noted that the decision in *Guice* was inconsistent with Section 95 of the Mississippi Constitution, which provides that "Lands belonging to, or under the control of the state, shall never be donated directly or indirectly, to private corporations or individuals" (Pet. App. 27). The court concluded (Pet. App. 28):

> We thus have no doubt that the State, in obedience to this constitutional mandate, unshackled by the common law, had full authority to enact Chapter 334 of the Laws of 1948, and pursuant thereto the Board of Supervisors had full authority to contract as it did with the United

> States for the acquisition of public funds and the perpetual dedication of this beach to the use of the general public. * * *

The court of appeals adhered to its decision on the petition for rehearing *en banc*, adding that (Pet. App. 33):

> The landowners, who were made parties to this litigation by order of the District Court, and their successors in title, should be permanently enjoined from in anywise interfering with the free public use of the said beach, subject to any and all valid laws and police regulations of the State of Mississippi and Harrison County. * * *

ARGUMENT

1. The first question framed by petitioners as to the intrusion of this decision into an area of local property law is simply not in this case. Petitioners ignore the fact that there is a valid contract between the United States and Harrison County, authorized by a statute of the State of Mississippi, plus a dedication to the public of the beach constructed under that contract, all consummated while the area in question was beneath the waters of Mississippi Sound. At that time, title to the area was clearly in the State, in trust for the public and not for the sole benefit of these upland owners. *Money* v. *Wood*, 152 Miss. 17, 118 So. 357; *Xidis* v. *City of Gulfport*, 221 Miss. 79, 72 So. 2d 153; *Harrison County, Mississippi* v. *Guice*, 244 Miss. 95, 140 So. 2d 838. A State may constitutionally dispose of such land for a public or non-public purpose, *Port of Seattle* v. *Oregon & W.*

R.R., 255 U.S. 56, but Mississippi limits the purposes to public ones. *Xidis* v. *City of Gulfport*, *supra*. It can hardly be questioned that the construction of the beach under the relevant statutes, federal and State, the dedication, and finally the contract, were entirely for a public purpose. These factors as to dedication of the fill to public use and the County's obligation under the contract were not resolved by the Supreme Court of Mississippi in *Harrison County, Mississippi* v. *Guice*, *supra*, relied on by petitioners (Pet. App. 5-11). Accordingly, the court of appeals correctly refused to accept petitioners' argument as to the effect of *Guice* as *stare decisis* in this case.

2. Nothing in the court of appeals' decision is in conflict with the Submerged Lands Act, 43 U.S.C. 1301 *et seq.* It has never been questioned that land under inland navigable waters within the State of Mississippi belongs to the State, *United States* v. *California*, 332 U.S. 19, 30-31, and Mississippi Sound is within this category, *Louisiana* v. *Mississippi*, 202 U.S. 1, 48. The Submerged Lands Act did not purport to change this rule. As Senator Cordon, the floor manager of the bill, explained (99 Cong. Rec. 2693), the Act confirmed title as to inland waters, such as Mississippi Sound, and released title as to the territorial sea, *i.e.*, out to three miles beyond the coastline in the case of Mississippi; the latter is not here involved.

It is clear that, under the Act, neither the State, the County, nor the upland owners obtained anything with respect to the submerged lands under inland waters that they did not already have. By public

enactments and declaration, as well as by the contract, the State-owned submerged lands in this case were dedicated to the public use as a public beach. There is no way to construe the Act as preventing the United States from obtaining judicial enforcement of its valid contract.

It also should be noted that Section 5 of the Act, 43 U.S.C. 1313, specifically excepted any lands filled by the United States for its own use. The land was filled with the aid of the United States and money from the federal treasury, and the use by the public required in the contract is arguably a use of the United States. The courts have frequently recognized that the United States may accomplish its public purpose by using its own agents, in whole or in part, or by cooperative arrangement with public or private interests, *e.g.*, *Berman* v. *Parker*, 348 U.S. 26; *United States* v. *First Pyramid Life Insurance Co. of America*, 382 F.2d 804 (C.A. 8); *United States* v. *Pleasure Drive. & Park Dist. of Peoria, Ill.*, 314 F.2d 825 (C.A. 7); *United States* v. *Board of Trustees*, 343 F.2d 149 (C.A. 4).

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted.

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